No. 15,321

United States Court of Appeals

For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Estate of William Jason Evans, Bankrupt, *Appellant,*

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association, *Appellee.*

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

Appellant filed a complaint (Tr. p. 3) and an amended complaint (Tr. p. 8) in the United States District Court for the Northern District of California, Southern Division, to recover money paid to Appellee (part of which was paid by the State of California under an assignment and part of which was paid by the bankrupt), pursuant to the provisions of Bankruptcy Act § 70e. (11 U.S.C.A. § 110e.) The District Court filed its Opinion and Order for Judgment (Tr. p. 27) (141 Fed. Supp. 225) and rendered its judg-

ment in favor of appellee. (Tr. p. 48.) Pursuant to the provisions of Bankruptcy Act § 24 (11 U.S.C.A. § 47) appellant filed a notice of appeal on August 16, 1956, (Tr. p. 50), which notice of appeal was timely filed within the limitation fixed by Bankruptcy Act § 25. (11 U.S.C.A. § 48.)

STATEMENT OF QUESTION PRESENTED.

Where an assignment of money due, or to become due, under a written contract with the State of California is made to secure repayment of money loaned without the filing of a Notice of Assignment under California Civil Code § 3019 and all loans made are repaid (some by the assignor, and some by collection under the assignment) more than four months before the bankruptcy of the assignor, may the assignor's trustee in bankruptcy recover either the payments made by the bankrupt or the money collected under the assignment?

STATEMENT OF FACTS.

On or about May 25, 1948, the bankrupt entered into a contract with the State of California for the construction of a bridge across Chamberlain Creek about 17½ miles west of Willits. (Plaintiff's Exhibit 1; admitted, Tr. p. 75.) On September 15, 1948, appellee, through its Berkeley main office, undertook to finance the bankrupt in the performance of said contract and as security took an assignment of money due or to become due under said contract. (Plaintiff's

Exhibit 4; admitted, Tr. p. 81.) The bankrupt had previously assigned the rights under said contract to Glens Falls Indemnity Company from which appellee obtained a subordination agreement. (Plaintiff's Exhibit 5; admitted, Tr. p. 81.) Between September 16, 1948, and December 21, 1948, appellee made various loans to the bankrupt as appears from the top half of the first page of plaintiff's Exhibit 7. (Admitted, Tr. p. 97.) From time to time, as the work progressed, warrants drawn by the State Controller payable to "Bank of America National Trust and Savings Association, assignee of Evans Construction Company" were issued. (Plaintiff's Exhibit 7.) The amount of each such warrant is set forth on page two of plaintiff's Exhibit 7. With the exception of the warrant dated January 6, 1949, in the amount of $3,785.76, each warrant was deposited in the bankrupt's "Special Account." (Plaintiff's Exhibit 7.) This account was a checking account payable on checks counter-signed by the persons designated in the subordination agreement. (Plaintiff's Exhibit 5.) Payments were made by the bankrupt, from time to time, on the various loans made by appellee to him. Those payments are set forth on the lower half of the first page of plaintiff's Exhibit 7. Four of those payments were made by checks drawn by the bankrupt on his special account. Two were made by setting off the debt of the bankrupt to appellee against the debt of appellee to the bankrupt on his checking account. A single payment was made by applying the proceeds of the State warrant dated January 6, 1949, in the amount of $3,785.76 directly on bankrupt's indebtedness.

In this action, appellant sought to recover not only the proceeds of the State warrant dated January 6, 1949, in the amount of $3,785.76, but also the amounts paid to appellee by the bankrupt by his checks and the amounts collected by appellee setting off against the account of the bankrupt. The appellant does not seek to recover under Bankruptcy Act § 60. (11 U.S.C.A. 96; Tr. p. 65.) Section 60 is inapplicable because all payments received by appellee were received more than four months prior to the filing of the Petition in Bankruptcy. (Plaintiff's Exhibit 7, and paragraph II of the amended complaint; Tr. p. 8.) In the court below, appellant did not seek to set aside or avoid the assignment (plaintiff's Exhibit 4), but rather to recover a judgment against appellee.

SUMMARY OF ARGUMENT.

1. Appellee may urge any matter appearing in the record in support of the judgment.

2. With a single exception, payments received by appellee were received from the bankrupt rather than under the assignment for which reason no invalidity of the assignment would affect appellee's right to them.

3. The assignment of a right to receive money under a written contract with the State of California is not an assignment of an "account" within the meaning of California Civil Code § 3017.

4. Even if the assignment to appellee was invalidated, appellant is entitled only to set aside or to avoid

the assignment; he may not recover payments made to appellee prior to the assignor's bankruptcy.

ARGUMENT.

APPELLEE MAY URGE ANY MATTER APPEARING IN THE RECORD IN SUPPORT OF THE JUDGMENT.

The rule is well settled that an appellee may urge any matter appearing in the record in support of the judgment without taking a cross-appeal. In *U. S. v. America Ry. Co.,* 265 U.S. 425 44 Sup. Ct. 560 (1924), it was contended that certain claims of the appellee could not be availed of because they had been overruled by the lower court and no cross-appeal had been taken. At page 435 the Supreme Court said:

> "The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered

below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

In *L. McBrine Co. v. Silverman,* 121 F. 2d 181 (C.C.A. 9th 1941) a district court judgment was modified and affirmed. The district court had dismissed actions in patent infringement suits on the ground that the claims involved were invalid and void. The court said at page 182:

> "We affirm the dismissals; not, however, on the ground assigned by the trial court, but on the ground that no infringement was shown. That we may affirm on a ground not assigned by the trial court is well settled."

Again in *Town of South Tucson v. Tucson Gas, Electric Light & Power Co.,* 149 F. 2d 847 (C.C.A. 9th 1945) the district court without filing an opinion, dismissed a condemnation suit. The court states at page 847:

> "Appellant assigns several grounds of error in the judgment of the district court. That court filed no opinion. It is contended that the Power Company is urging here certain matters not presented in the court below and hence not within our cognizance. In this the appellant is in error, since we are required to seek the support of the judgment appealed from upon any ground disclosed in the record."

WITH A SINGLE EXCEPTION, PAYMENTS RECEIVED BY APPELLEE WERE RECEIVED FROM THE BANKRUPT RATHER THAN UNDER THE ASSIGNMENT FOR WHICH REASON NO INVALIDITY OF THE ASSIGNMENT WOULD AFFECT APPELLEE'S RIGHT TO THEM.

The payments received by appellee on October 11, 1948, November 16, 1948, December 13, 1948, and the payment for interest received on December 20, 1948, were made by means of checks drawn by the bankrupt on his special account. (Plaintiff's Exhibit 7.) Payments received by the appellee on March 22, 1949, and April 7, 1949, were made by means of setoff, *i.e.,* appellee setoff the debt of the bankrupt, consisting of the loans made to him, against its debt to him, consisting of his special account. (Plaintiff's Exhibit 7.) The only payment received by appellee from the State of California was the payment of January 6, 1949, in the amount of $3,785.76, which was applied to the bankrupt's indebtedness. (Plaintiff's Exhibit 7.)

Except for the January 6 payment, appellee did not, in fact, collect or receive money from the State of California as assignee of the bankrupt. Excepting the January 6 payment, all money paid under the contract was deposited in the bankrupt's special account. Excepting the January 6 payment, all payments to appellee came from the bankrupt, *not from the State of California.* With exception of the January 6 payment, it is difficult to see how appellant has any claim against the appellee for these payments based on the alleged invalidity of the assignment. (Plaintiff's Exhibit 4.)

This conclusion is supported by the decision in *M. M. Landy, Inc. v. Nicholas,* 221 F. 2d 923, (C.A. 5th,

1955.) The assignments involved in that case were invalid because they were neither recorded as required by State law, nor made in compliance with the Federal Assignment of Claim Statute, 31 U.S.C.A. § 203. Although the assignments were invalid, the court held that the trustee in bankruptcy of the assignor could not recover non-negotiable warrants issued by the Federal Government to the bankrupt and delivered to the assignee. The court held that the possession of the warrants by the assignee constituted a valid pledge and a perfection of the assignee's security interest. The case was remanded, however, since on the record the court could not determine whether the perfection had occurred more than four months prior to bankruptcy. Excepting the January 6 payment, the payments received by appellee from the bankrupt in this case were at least equivalent to the transfer of non-negotiable warrants in the *M. M. Landy, Inc.* case. Even if it is assumed that the assignment was invalid, or that there was no assignment at all, those payments by the bankrupt standing alone were sufficient to pass good title to the funds to appellee. Appellant concedes no question of preference is involved. (Tr. p. 65.)

Therefore, as to all payments received by appellee, except the January 6 payment, the judgment should be affirmed on the ground that the allegedly invalid assignment is not involved.[1] If the judgment as to those payments is affirmed on that ground, then the

[1]The *M. M. Landy Inc.* decision does not extend to the January 6 payment, because the record fails to show that the bankrupt actually received the warrant, constituting the January 6 payment from the State, and then transferred it to appellee.

remainder of this brief is properly directed only to the proceeds of the January 6 payment, in the amount of $3,785.76. Otherwise, the remainder of this brief is directed to the rights of the parties to the proceeds of all payments.

THE ASSIGNMENT OF MONEY PAYABLE UNDER A WRITTEN CONTRACT IS NOT AN ASSIGNMENT OF AN "ACCOUNT" WITHIN THE MEANING OF CALIFORNIA CIVIL CODE §3017.

(a) The right assigned was not an "account".

The District Court concluded that the assignment (plaintiff's Exhibit 4) of the bankrupt's right to receive money due or to become due under the written contract (plaintiff's Exhibit 1) constituted an assignment of an account, within the meaning of California Civil Code § 3017. (Conclusion No. 1; Tr. p. 47.) Appellant relies on *Menick v. Carson,* 96 F. Supp. 817 (D.C. Cal. 1951.) However, in that case, the question whether the subject of the assignment there involved was an account was not raised. *Menick v. Carson* is inapplicable to the case at bar because the rights assigned to appellee did not constitute an account.

Section 3017(1) of the Civil Code of the State of California as in force on September 15, 1948, provided:

> " '*Account*' means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance or other instrument for the payment of money; it includes rights under an unperformed

> contract for work, goods or services which in the regular course will result in an open book account."

Appellant cannot prevail unless the rights assigned to appellee constitute an account within the meaning of the language quoted above. Even if the subject of the assignment is an account, appellant still may not succeed if the account was represented by an "instrument for the payment of money."

A long, consistent line of California cases has established that a written contract can never result in an "account" except by agreement of the parties thereto.

Parker v. Shell Oil Co., 29 Cal. 2d 503, 175 P. 2d 838 (1946);

Tillson v. Peters, 41 Cal. App. 2d 671, 107 P. 2d 434 (1940);

Lee v. DeForest, 22 Cal. App. 2d 351, 71 P. 2d 285 (1937);

Stewart v. Claudius, 19 Cal. App. 2d 349, 65 P. 2d 933 (1937);

Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692 (1914).

The text writers are in accord with the definition of "account" established by the cases cited above.

Section 4 of the article on Accounts and Accounting in Volume 1 of California Jurisprudence 2d, summarizes in part (pp. 316-317):

> "The claim comprising an account may or may not be evidenced by a written record; but *it cannot be evidenced by a written obligation or express*

contract and constitute an account in the ordinary sense." (Emphasis added.)

Section 49 of the article on Account in Volume 1 of Corpus Juris Secundum reads in part (pp. 573-575):

"*Accounts receivable.* The amount owing to a person on open account.

" * * *

"*Open Account.* An open account is one in which some item of contract is not settled by the parties, or where there have been running or current dealings between the parties and the account is kept open with the expectation of further dealings. In other words, it is an unsettled debt arising from items of work and labor, goods sold and delivered, *and other open transactions not reduced to writing, and subject to future settlement and adjustment.* However, all accounts which are not stated or reduced to writing are not necessarily open accounts; and an account, although not reduced to writing or stated, cannot be said to be open where it is based on a contract whose terms are fixed and certain." (Emphasis added.)

Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692 (1914), contains this definition of "account", at page 253:

"In 1 Ruling Case Law, page 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually

> disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.' "

By taking the position that "the sole question before the court is whether the collection of the account by the assignee extinguishes the account" (appellant's Brief, p. 6), appellant avoids discussing most of the points in issue in his opening brief. We assume, however, that it is appellant's position that the rights assigned to appellee were accounts merely because the bankrupt kept books which have been referred to as "books of account". Some of the testimony elicited so indicates. (Tr. pp. 75, 84, 85, 86.) If that position is sustained, the result will be a holding that the bankrupt had the legal power, by his arbitrary act of keeping or not keeping books, to determine the validity of the security held by appellee.

We submit that the bankrupt had no such legal power. The ability of one party to affect the legal rights of another by keeping accounts rests entirely in the consent of the other that the account be kept and that his rights be so affected. The requirement of consent is stated by the California Supreme Court of the State of California, in *Parker v. Shell Oil Company,* 29 Cal. 2d 503, 507, 175 P. 2d 838, (1946):

> "A mutual, open, current account must consist of reciprocal demands. It is not enough, to constitute a mutual account, that there exist debts which could be the subject of setoff; there must be an understanding, express or implied from the

> nature of the dealings between the parties, that charges on each side are to extinguish *pro tanto* those on the other side, so that there exists but one indivisible liability arising from the series of transactions."

Nothing in the Record indicates consent on the part of either appellee or the State of California to be bound by records kept by the bankrupt. On the contrary, the Record indicates that even the bankrupt did not consider his entries to be a determination of the amounts due under the contract. The amounts entered in the bankrupt's "accounts" are not in agreement with the amount paid by the State of California, yet the payments were accepted without objections. (Tr. p. 90.) Since the rights assigned are not within the meaning of "account", and since there was no understanding that an "account" should be kept, no filing was required.

(b) The money was payable under an "instrument for the payment of money".

Even if we assume that the assignment of the right to receive money under the contract here involved was an assignment of an "account", the assignment nevertheless is excluded from the operation of the California statute because the right assigned was represented by an "instrument for the payment of money."

In *In re Richards,* 108 F. Supp. 259 (S.D. Cal. 1952), the District Court for the Southern District of California held that an assignment of a debt arising under the terms of a written contract is not within

the operation of California Civil Code § 3017 because it is not an assignment of an "account", and that even if it were, it would be excluded from the purview of the statute as an assignment of a debt represented by an "instrument for the payment of money".

The *Richards* case is the only one which has directly dealt with this particular point. It involved a petition for review of an order of the referee in bankruptcy determining that certain money due the bankrupt under a "dealer's agreement" constituted an account within the meaning of §§ 3017, *et seq.,* of the California Civil Code. The bankrupt in that case assigned his rights to payment under certain conditional sales contracts to a bank under a "dealer's agreement". Pursuant to the agreement, the bank reserved a balance of 5 per cent as a reserve account against payment of the conditional sales contracts. Thereafter the bankrupt borrowed money from Pantages and by a document designated as a "general pledge agreement" assigned as security to Pantages his interest in the 5 per cent reserve account. Notice of the pledge was given to the bank, but no notice of assignment was filed under California Civil Code § 3017, *et seq.* The Referee's order held the assignment invalid and directed the bank to pay the trustee.

The District Court reversed the order of the Referee and furnished an unequivocal guide for the application of the California statute to the facts in the instant case (pp. 261-262):

> "Clearly the money due to Richards under the dealer's agreement was money 'represented' by

that 'instrument' for the payment of money to Richards. The Bank purchased the contracts and owed Richards the money. And while it is true that the amount might change from time to time, nevertheless the sole right of Richards to recover from the Bank depended upon that contract. If Richards sued the Bank he would have had to sue on the contract as it alone defined the liabilities and rights between them. The fact that such account was called a 'reserve account' was a mere matter of nomenclature and did not bring the transaction within the definition as an 'account'; and the fact that the Bank might have kept books showing the amount due did not do so either. Such entries in books would be a mere memorandum of the *debt which accrued under the terms of the written contract.*

"If the argument of the Trustee is correct it would follow as a logical conclusion that all conditional sales contracts which Richards entered into with his customers and which are so widely used in the sale of hard goods and commodities in the commercial world today, were and are 'accounts' within the definition of Section 3017 and that the assignment and transfer of those contracts by Richards to the Bank would be void unless notice were given as required by Section 3017 of the California Civil Code. It is inconceivable that the legislature intended to impose such a burden upon the commercial world.

"The statute plainly does not and was not intended to cover a situation where the obligation is evidenced or 'represented', as the statute says, by 'an instrument in writing' such as exists in the instant case."

In the *Richards* case the parties at times designated the right to payment assigned as an "account". Notwithstanding this designation, the court held the right assigned was not an "account" within the meaning of the California statute because it was represented by a written agreement. In the case at bar the right assigned has not been designated an "account" by the parties.

(c) The right assigned could only arise under a written contract.

An even stronger argument can be made in this case because of the nature of the contract involved. Plaintiff's Exhibit 1 is subject to c. 3, part 5, div. 3, tit. 2 of the California Government Code. California Government Code § 14254 reads as follows:

> "As used in this chapter, 'project' includes the erection, construction, alteration, repair or improvement of any state structure, building, road, or other state improvement of any kind which will exceed in cost a total of two thousand dollars ($2,000)."

Since the contract (plaintiff's Exhibit 1) is within the definition of "project", the right to receive money from the State of California arose, *and could have arisen only,* under and pursuant to a written instrument and the provisions of the California Government Code cited above. The California Government Code, § 14272, provides:

> "Work on all projects shall be done under contract awarded to the lowest responsible bidder pursuant to this chapter, except that it may be

done by day's labor under the direction of the department:

" * * * (Exceptions not applicable here.)"

The duty of the State to pay and the right of a contractor to receive payment is controlled by California Government Code § 14402, which reads as follows:

"Payments upon contracts shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 90 percent of the percentage of actual work completed, plus a like percentage of the value of material delivered on the ground or stored subject to or under the control of the State, and unused. The department shall withhold not less than 10 percent of the contract price until final completion and acceptance of the project. The Controller shall draw his warrants upon estimates so made and approved by the department and the Treasurer shall pay them."

Since the right to receive payments from the State of California arose under a contract in writing and pursuant to the provisions of the California Government Code, *and since the obligation could arise in no other way,* no right of the bankrupt to payment under the contract could exist by virtue of any account kept by him. His right to payment could only exist by virtue of the written contract (plaintiff's Exhibit 1), the California Government Code, and the estimates *made by the department* pursuant thereto. That the bankrupt made entries in his books which were charac-

terized by appellant's witness, Mr. Mendelson, as accounts, (Tr. pp. 85, 86, 87) can in no way affect the applicability of California Civil Code § 3017. As stated in *In re Richards,* 108 F. Supp. 259 (S.D. Cal. 1952), at page 261, such entries "would be a mere memorandum of the debt which accrued under the terms of the written contract". The payments upon such contract are "made as the department prescribes upon estimates made and approved by the department," not upon entries made by a contractor in his books. The bankrupt apparently accepted payment of a lesser amount than his books indicated was due him without objection.

(d) Subsequent legislation shows filing of notice was never required.

It seems that the legislature never intended that contracts relating to public works, or the assignment thereof, should be subject to the provisions of California Civil Code §§ 3017, *et seq.* In 1953, the legislature recast § 3017 so as to clarify the definition of "account". Subsection 1 of § 3017 was changed from a single paragraph simply setting forth what the term "account" included to a paragraph setting forth what type of obligations were included, together with three subsections expressly stating that certain types of obligations were not included within the meaning of that term. It is well settled that when a statute is recast to clarify its meaning without changing the substance of its provisions, the legislative intent of the old statute will be determined as that intent is clarified in the new statute. For example, in *Commissioner v. Estate*

of Holmes, 326 U.S. 480, 66 Sup. Ct. 257 (1945), rehearing denied 327 U.S. 813, 66 Sup. Ct. 519, the court was faced with the effect of the recasting of § 302(d) of the Revenue Act of 1926. That section was rewritten in two separate paragraphs, each relating to revocable transfers. The phrase "to alter, amend or revoke" in § 302(d) was changed to read in the new § 811(d)(1), "to alter, amend, revoke or terminate". The words "or terminate" were not added to the phrase as used in § 811(d)(2). The question presented was whether the addition of the words "or terminate" constituted a change of substance or merely a clarification of the old section. In holding that the additional words merely clarified the meaning of the old statute, and that the phrase "to alter, amend or revoke" as used in the old statute meant "alter, amend, revoke or terminate," the court said, at page 487:

> "The 1936 revision resulted from the *White* decision, which raised doubt whether Congress had included the power to terminate in the words 'alter, amend, or revoke.' To clarify the matter Congress removed all doubt for the future by enacting § 811(d)(1). At the same time it adopted § 811(d)(2), which retained the earlier phrasing. This was from concern that retroactive application of § 811(d)(1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of § 811(d)(2) shows. Notwithstanding this and the doubt created by *White v. Poor,* supra, the report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of 'or terminate' in § 811(d)(1) was 'declaratory

> of existing law'. Administrative interpretation, including Treasury Regulations, support this view, which also is either followed or indicated in decisions of the Circuit Courts of Appeals, except the one now in review. As we have pointed out, that view is more consonant with the structure and interpretation given concomitant taxing act provisions. For all these reasons, we think it must prevail."

The recent case of *United States v. Parkinson,* U.S.D.C. S.D. Cal. (Carter, J.), decided October 21, 1955, 24 U.S. Law Week 2191-2192, also supports the proposition that legislative intent and the meaning of a statute may be derived from an amendment which merely recasts or clarifies the statute. The question was whether the District Court had discretionary power ancillary to its jurisdiction to grant injunctive relief under § 302(a) of the Federal Food, Drug and Cosmetic Act to compel the defendants in that case to refund to purchasers the money paid for drugs.

The Fair Labor Standards Act and the Federal Food, Drug and Cosmetic Act were enacted on the same day and contained almost identical provisions for equitable relief. Several appellate courts had held that restitution of back pay could properly be ordered as an adjunct to an injunction under § 17 of the Fair Labor Standards Act. The Supreme Court had never ruled on this question. Congress being concerned with the interpretation of § 17 amended that section to provide in express terms that restitution was not authorized thereunder, and enacted other statutory provi-

sions relating to restitution. The opinion, with reference to the effect of the amendment of the Fair Labor Standards Act as showing the legislative intent and meaning of the similar provisions in the Federal Food, Drug and Cosmetic Act (24 U.S. Law Week 2192), said:

> "This blunt repudiation by Congress of the asserted powers of a district court to order restitution under Fair Labor Standards Act, with its almost identical provision to that of Section 302 (a) of the Food and Drug Act (Sec. 332(a) U.S.C.A. Title 21), is significant and convincing insofar as this court is concerned."

The recasting of Section 3017 and the addition of § 3017(c) does no more than clarify the meaning of the former section by providing in express terms that contracts for public construction of the type assigned by plaintiff's Exhibit 1 are not accounts as that term is used in California Civil Code §§ 3017, *et seq.*

EVEN IF THE ASSIGNMENT IS INVALID, PLAINTIFF MAY DO NO MORE THAN DISREGARD IT AND COLLECT FROM THE BANKRUPT'S DEBTOR SUCH SUMS AS REMAIN DUE THE BANKRUPT UNDER THE CONTRACT.

(a) Menick v. Carson does not control this case.

While denying that such is the case, we assume, arguendo, that the assignment (plaintiff's Exhibit 4) was of an "account" within the meaning of California Civil Code § 3017. Since appellee did not comply with § 3019, the question arises whether present or future creditors are restricted to disregarding the

assignment (as distinguished from recovering money collected by appellee) and collecting from the assignor's debtor such sums as may remain unpaid. In other words, may they, in addition to disregarding the assignment, proceed against the appellee and recover from appellee the money it has collected?

Appellant relies entirely on *Menick v. Carson,* 96 F. Supp. 817. (S.D. Cal. 1951.) Initially it should be pointed out that that case dealt with open book accounts, and the question whether the accounts assigned were accounts within the meaning of California Civil Code § 3017 was not raised. The court holds as follows, at page 820:

> "In paragraph VIII of the complaint the plaintiff alleges the existence of two groups of creditors. He alleges that there are persons who advanced credit to the bankrupt in the period between June 20, 1948, and February 14, 1949, none of whom had any actual or constructive notice of the assignments of the accounts by the bankrupt to the defendant. But plaintiff fails to allege that these persons extended credit prior to the collection of the accounts by the assignee. This is a fatal omission. Plaintiff also alleges that there are persons who advanced credit to the bankrupt prior to the assignments in question and that the bankrupt remained indebted to these persons at the time of bankruptcy. But plaintiff fails to allege that these persons were 'without notice of such assignment(s)' as is required by Section 3019. *Thus the plaintiff has failed to state a claim against the defendant upon which relief may be granted.* Therefore the motion to dismiss

should be granted but with leave to amend." (Emphasis added.)

It is submitted that the italicized sentence of the above quotation constitutes the holding of the case. Since the holding is that the plaintiff failed to state a claim upon which relief could be granted, the discussion of the court, with respect to what is an account within the meaning of § 3019, and its statements, with respect to the right of a trustee in bankruptcy to recover proceeds paid to an assignee under an assignment invalid for non-compliance with California Civil Code § 3019, are *dicta.* Because the views expressed by the court with respect to the right of a trustee in bankruptcy to recover the proceeds of an assignment from the assignee are directly contrary to the position taken by Appellee, it is necessary to take issue with them. With reference to California Civil Code §§ 3017, *et seq.,* the court states that the purpose "is to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtor's financial position." It is submitted that the court's construction of those sections and its entire discussion of their effect and applicability are based on this statement of purpose. It is submitted further that the court was in error.

Prior to the enactment in 1938 of the Chandler Act, 52 Stat. 840, the various states followed one of three common law rules which determined when an assignment of accounts became effective as against subsequent bona fide purchasers. Briefly stated those three

rules are: (1) The English rule or notification rule under which the assignee who first gave notice of his assignment to the debtor on the account assigned perfected his assignment; (2) The New York rule which gave effect to the assignment first in time without regard to notice; and (3) The Massachusetts rule adopted by the *Restatement of Contracts.*[2] Prior to 1938, the general rule was that an assignment of accounts otherwise valid did not amount to a preference, even though no notice was given to the obligors on the accounts assigned. In *Corn Exchange National Bank and Trust Co. v. Klauder,* 318 U.S. 434, 63 Sup. Ct. 679 (1933), it was held that under the Chandler Act an assignment in the so-called notification states was not perfected until notice of the assignment was given to the obligors on the account assigned. Although present value was given for the assignment, such consideration would be antecedent to the delayed effective date of the transfer, and the assignment would be subject to avoidance as a preference under Section 60(a) of the Bankruptcy Act. Section 60(a) was thereafter amended in 1950 to avoid this difficulty. With reference to the *Klauder* case and cases following it, 3 *Collier on Bankruptcy* states, at page 966:

> "Even before this amendment was made, however, *these cases produced another result in the field of state legislation.* Numerous states enacted 'validation acts', adopting the New York common law rule (Rule 2 above), and validating an assignment of accounts as against subsequent *bona fide* purchasers of the same accounts regardless of

[2] 3 *Collier on Bankruptcy* (14th ed., 1941), §60.48, page 964.

> notice to the account debtors. Other states enacted statutes under which recording or filing is required for validity as against either purchasers or creditors. A few adopted book-marking statutes, under which an assignment may be perfected by making a notation of it upon the assignor's account books." (Emphasis added.)

California and Florida were among the states which enacted statutes requiring recording or filing. The view that the purpose of such statutes is not to prevent secret liens or transfer, but rather to afford assignees a means of perfecting assignments of accounts so as to avoid the rigors of § 60(a) as enacted by the 1938 Bankruptcy Act is further supported by *M. M. Landy, Inc. v. Nicholas,* 221 F. 2d 923 (C.A. 5th Cir. 1955), in which the court stated, with reference to the Florida statute, in footnote 4 at page 928:

> "We may judicially note that this statute, like those in 35 other states, *was adopted as a direct result of the Chandler Act amendment* to § 60, sub. a of the Bankruptcy Act, 11 U.S.C.A. § 96, sub. a, and its application in Corn Exchange Nat. Bank & Trust v. Klauder, 318 U.S. 434 * * * *." (Emphasis added.)

The case of *Durkin v. Durkin,* 133 Cal. App. 2d 283, 284 P. 2d 185 (1955), adjudicated the priorities of several creditors to an insolvent's "Dealer's Reserve Account" which had been created and was governed by a written contract. The insolvent had assigned his rights in it to one of the creditors. On the principle question, whether it was an "account" within the meaning of California Civil Code § 3017, the court

held in the negative. The court found additional support for its conclusion in the "history of legislative enactments and judicial decisions affecting nonnotification financing of accounts receivable." The court observed that the decision in the *Klauder* case "gave impetus to the urge for state legislation designed to foster nonnotification financing of accounts receivable in a manner that would obviate the results of the decision." The court states at page 292:

> "There is no doubt that chapter 766 of the California Statutes of 1943, page 2542, adding sections 3017-3029 to the code (described in its title as 'An act . . . relating to the assignment of accounts receivable and providing for the giving of notice thereof'), was designed to facilitate nonnotification financing of accounts receivable by substituting the filing requirements of section 3019 for the former requirement that each customer-debtor be notified of the assignment. (See 38 Cal. L. Rev. 308-309; 17 So. Cal. L. Rev. 303, 306.) In our case the dealer and the bank had no need for such a remedy. Here the 'accounts receivable,' being in the form of conditional sales contracts, were readily transferable without notice to the customer-debtor. There was no occasion to impose filing requirements to facilitate nonnotification financing of such accounts. Similarly, there was no occasion, in furtherance of such financing, to impose filing requirements upon the manufacturer, merchant or dealer whenever he chose to convey an interest in credits accruing to him from the bank that financed these accounts for him, because there was no conceivable reason, in fact or in fancy, for not notifying the debtor-bank as was immediately done in the instant case."

It is hardly necessary to point out that in the case at bar there is no reason for imposing filing requirements respecting the assignment involved because there is no conceivable reason for not notifying the State of California. As the assignment (plaintiff's Exhibit 4) shows, such notice was promptly given. (See Disbursing Officer's stamp.)

In view of the development of California Civil Code §§ 3017, *et seq.,* the conclusion seems inescapable that the purpose of this enactment was not to protect creditors, but on the contrary to protect assignees. Because of the effect of Bankruptcy Act § 60(a), it was deemed advisable by the legislature to set up some scheme whereby assignments of accounts which were perfected could be distinguished from those which were not perfected. The device adopted in California was that of requiring the assignee and assignor to file a notice with a public officer. The legislature did not make assignments for which no notice had been filed invalid for the purpose of protecting existing and future creditors, but rather made that class of assignments invalid as a *necessary complement* to the class of valid or perfected assignments, *i.e.,* those assignments for which notice was filed. In declaring that a certain class of assignments is invalid as to certain persons and that another class of assignments is valid, the legislature did not disclose an intention to protect those persons who might take advantage of the invalidity of invalid assignments.

Although present and future creditors, as well as subsequent assignees, may take advantage of invalid

assignments this fact does not evince any legislative purpose other than to provide a means of perfecting assignments of accounts. The legislature could not have entertained a purpose to give protection to assignees of accounts receivable and at the same time, have entertained an inconsistent purpose of increasing the hazards of taking such assignments. In determining the purpose for which a statute is enacted, as an aid in construing the statute, reference should be made of the problem it is designed to solve, not the technique or device selected to accomplish that purpose. When reference is made to the purpose of the enactment of a statute, as an aid to resolve ambiguity of the statute, it is illogical to derive that purpose from the very same statute.

With the true purpose for the enactment of this statute in mind, it is clear that the statute was not designed to prevent secret liens and transfer, and that allowing an assignee to keep money collected under an invalid assignment does not "practically make the statute a nullity."[3] On the contrary, allowing the assignee to keep such money as he collects, aids and promotes the purpose of the statute by allowing to him at least part of the security he enjoyed before the enactment of the Chandler Act.

The court's misconception of the purpose of California Civil Code §§ 3017, *et seq.,* led it to regard assignments declared *invalid* under § 3019 analogous to chattel mortgages *void* under California Civil Code § 2957 and transfer *fraudulent and void* under Cali-

[3]*Menick v. Carson,* at p. 819.

fornia Civil Code § 3440. This misconception of purpose also led the court to assert at page 820:

> "Since Section 3019 deals with the same general subject and has the same purpose, it should be construed *in pari materia* with Sections 2957 and 3440."

In *Smith v. Harris,* 127 Cal. App. 2d 311, 273 P. 2d 835 (1954), the court was faced with the question whether recordation of assignments was required when the assignee and assignor resided outside California. In holding no recordation was required, the court observed that the parties agreed §§ 3017-3029 should be read *in pari materia* with §§ 2957 and 3440. (citing *Menick v. Carson.*) The court replied at page 315:

> "But by clear construction those sections [2957 and 3440] are concerned only with tangible personal property, not with choses in action, *which because of their intangible nature, are distinguishable.* It has been pointed out in cases that the possession of personal property by the vendor gives him visible credit in the eyes of the world, *a characteristic that does not apply to debts.*" (Emphasis added.)

In addition to the difference in subject and purpose between California Civil Code §§ 3017, *et seq.,* and §§ 2957 and 3440, the difference in terminology must be considered. Chattel mortgages which are within § 2957 are *void* against the protected persons. Transfers which are within § 3440 are *fraudulent and void,* but assignments of "accounts" are merely *invalid,* if there is no compliance with § 3019. Thus, the views

expressed in *Menick v. Carson* are not applicable in this case.

(b) Collection cured any defect that might have existed respecting the assignment to appellee.

The invalidity of an assignment, as to certain persons, cannot affect title to money collected under it. The invalidity permits the favored persons to set aside or avoid the assignment and prevents the debtor from discharging his debt by thereafter paying to the assignee. But the avoidance cannot have retroactive effect. The debtor's act of paying *his* money to the assignee surely gives the assignee good title to it. Payment from the debtor to the assignee under an invalid assignment before avoidance is probably effective to discharge the debtor's obligation. But whether payment is made before or after avoidance, *it is the money of the debtor that is paid,* not that of the assignor. Thus, the invalidity of an assignment merely means that the debtor may not pay to the assignor with liberating effect (*i.e.,* be discharged of his obligation), after the assignment is avoided. It does not mean that persons entitled to assert the invalidity have a right to recover the *debtor's money* from the assignee.

Two cases in the Second Circuit hold that the assignee obtains good title, as against the assignor's creditors, to money collected under invalid assignments. The assignments in these cases were invalid under the rule of *Benedict v. Ratner,* 268 U.S. 353, 45 Sup. Ct. 566 (1925). It is submitted, however, that the reason for holding the assignment invalid is im-

material in so far as the assignee's rights to retain money collected prior to bankruptcy are concerned.

In *Lee v. State Bank and Trust Co.,* 38 F. 2d 45 (C.C.A. 2d 1930), where the case was remanded for further proceedings to determine whether the assignment was fraudulent in that the assignor reserved dominion, the court said, at page 48:

> "While no lien would arise merely by virtue of assignments, dominion over which was agreed to be retained by the assignor, nevertheless, if the loans made by the bank were not given with intent to hinder or delay creditors, the transaction was not void; as to moneys actually collected on the accounts prior to the date of the bankruptcy, the bank would be in the same position as any creditor to whom payments had been made at the times of collection; that is, the payments would be recoverable only if the elements of unlawful preference were established. But, as heretofore stated, the evidence fails to sustain plaintiff in this respect. It follows, therefore, that moneys collected before bankruptcy may be retained; moneys collected by defendant thereafter, through payment of these accounts, are subject to the further determination of the court on the entire case."

Walradt v. Miller, et al., 45 F. 2d 686 (C.C.A. 2d 1930), involved an assignment of accounts, which assignment was invalid because of dominion reserved by the assignor. As to the trustee's rights where the assignee had collected part of the accounts, the court states, at page 687:

> "From the fact that Cohen not only kept the accounts, but was to, under his arrangement with Miller, and did, reserve and exercise complete dominion over them, there arises a conclusive presumption that the first assignment was fraudulent as to creditors. Benedict v. Ratner, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991. The trustee is now entitled to have assigned to him any uncollected accounts covered by the assignment of December 11, which were outstanding and unpaid when the petition in bankruptcy was filed January 11, 1927, and to have any money collected by Miller after January 11, 1927, on the accounts assigned in December also turned over. But it is not enough that the assignment was invalid to entitle him to recover any money received by Miller before bankruptcy either from Cohen or directly from the collections made by Miller himself on the accounts assigned. At the worst, such payments to Miller were only preferential."

The last two cases cited bar a trustee in bankruptcy from recovering money collected prior to bankruptcy by an assignee of accounts receivable under an invalid assignment. Appellant, however, may take a contrary position. He may point out that a mortgagee under a *void* chattel mortgage cannot cure the defect by taking possession of the mortgaged chattels (*Loosemore v. Baker,* 175 Cal. 420, 166 Pac. 26 (1917)), also, that a purchaser at a sale *void* under California Civil Code § 3440 cannot cure the defect in his title by subsequently obtaining possession of the property. (*Della v. Home Bank of Porterville,* 105 Cal. App. 106, 286 Pac. 1064 (1930).) Based on these

propositions he may assert that an assignee of money under an invalid assignment cannot perfect his title by collecting it.

As is pointed out below, no analogy is to be drawn between the position of an assignee under an invalid assignment and the position of a mortgagee under a void chattel mortgage or the position of a purchaser under a void bill of sale. The *purpose* of the assignment statutes differs from the purposes and terms of the chattel mortgage and fraudulent sales statutes. In *Smith v. Harris,* 127 Cal. App. 2d 311, 273 P. 2d 835 (1954), where the parties had mistakenly agreed that California Civil Code §§ 3017-3029 should be read *in pari materia* with California Civil Code §§ 2957 and 3440 the court said, at page 315:

> "But by clear construction those sections [2957 and 3440] are concerned only with tangible personal property, not with choses in action, *which because of their intangible nature, are distinguishable.* It has been pointed out in cases that the possession of personal property by the vendor gives him *visible credit* in the eyes of the world, a characteristic that does not apply to debts." (Emphasis added.)

Furthermore, it should be observed that even in the case of a void chattel mortgage, if the mortgagee obtains possession of the chattels by a voluntary transfer from the mortgagor as *payment,* rather than under his void chattel mortgage, such transfer gives the mortgagee good title. In *Stephens v. Perrine,* 143 N.Y. 476, 39 N.E. 11 (1894), the court held that a chattel mort-

gage was void because the mortgagee neither took possession of the property nor recorded the mortgage. The court also held the mortgagee could acquire no rights by taking possession of the property "under the mortgage" and selling it. The same rule is declared for California in the *Loosemore* case, *supra.* The court stated, however (39 N.E. 12):

> "If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been, in such a case, a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make. But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage all the time. The mortgagors did not deliver the property to her in payment of her debt."

In *Bowdish v. Page,* 153 N.Y. 104, 47 N.E. 44 (1897), Isaac Allison had executed a void chattel mortgage to M. & F. Allison. M. & F. Allison assigned to plaintiff for the benefit of creditors. Plaintiff made demand on Isaac Allison who then transferred the property to plaintiff. Plaintiff continued in possession until dispossessed by the levy of an execution by defendant issued upon a judgment recovered against Isaac Allison. The court held plaintiff's title rested on the transfer to him by Isaac Allison, not on the void chattel mortgage and assignment. At the time of that transfer defendant had acquired no lien on the

property. Therefore, plaintiff's right to the property was superior. The court states (47 N.E. 46):

> "That case and *Karst v. Gane,* 136 N.Y. 316, 32 N.E. 1073, *Tremaine v. Mortimer,* 128 N.Y. 1, 27 N.E. 1060, and *Mandeville v. Avery,* 124 N.Y. 376, 26 N.E. 951, held this doctrine: That, while the mortgagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet if the mortgagor treats it as void, and, before the creditors obtain a lien, transfer the property to the mortgagee in payment of a debt, the transaction will hold. We therefore hold that, within our decisions, the plaintiff occupied the vantage ground of a right to the possession of these goods, derived directly through Isaac's delivery to him, and any question of a title made defective through the void chattel mortgage was removed."

It is not disputed that all money in question, except the January 6 payment, was received by the appellee in voluntary payment of the debts to which it was applied.

A sale and a chattel mortgage are similar in that either constitutes a transfer of tangible property from the mortgagor or vendor; it is the property of the mortgagor or vendor that is transferred, and only two parties are involved. An assignment differs in that only an intangible right of the assignor to collect money from his debtor is transferred, rather than tangible property of the assignor; it is the debtor's money that the assignee may collect, not that of the assignor, and an assignment always involves three parties, *i.e.,* the debtor, the assignor and the assignee.

Possession of tangible property gives the possessor an apparent wealth and invites others to lend money or credit to him on that basis; intangible personal property does not.[4] The ostensible ownership of tangible property gives rise to the policy of the law to protect innocent persons against being deceived by it. The policy is well stated in *Ruggles v. Cannedy,* 127 Cal. 290, 53 Pac. 911 (1899), at 297, where the court quoted from 2 Kent's Commentaries, 523 as follows:

> " 'The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the *visible* owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. * * * It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.' " (Emphasis added.)

But this reasoning has little application where intangible property is involved, for intangible property creates no apparent wealth. No one should be deceived by what he cannot see. If it should be asserted that accounts receivable create an apparent wealth since prospective creditors may be led to believe that they exist by an inspection of an assignor's books, the answer is that the same impression can be created by

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[4]See quotation from *Smith v. Harris,* 127 Cal. App. 2d 311, at page 315, 273 P. 2d 835 (1954), *supra* at page 33.

entirely fictitious accounts. Where business considerations make notification undesirable, verification with account debtors is undesirable for the same reason. On the other hand, where tangibles are involved apparent property cannot be created, and creditors can verify a debtor's claim to possession of such property. Prospective creditors can be deceived by a debtor only if secret liens are allowed to attach to the property.

There is a further distinction to be drawn between sales and chattel mortgages of tangible personal property and the assignment of intangible rights to receive money. Suppose a creditor of a mortgagor attacks the mortgage as being void, and the mortgage is held to be void. The creditor may then reach that property as property of the mortgagor, not because the mortgage is void, but because the property was never effectively transferred from the mortgagor. The property is subject to the claims of the mortgagor's creditors just as any other property owned by the mortgagor and for the same reason. The same is true where a fraudulent and void sale is involved. No title passes. The property remains that of the seller and is subject to the claims of the seller's creditors. When a mortgage or sale is void, the property which creditors may reach is that of the mortgagor or vendor, not that of a third person.

Suppose an assignment of the right to receive money is attacked by creditors of the assignor and is held invalid. The situation is entirely different. If the money assigned has not been collected, then the fact that the assignment is invalid deprives the assignee

of any right to collect it. The assignment being invalid, the assignor is entitled to collect such amounts as have not already been collected and the creditors of the assignor are entitled to have such money applied to their claims. The assignor (or his creditors) may collect from the debtor because the obligation is not discharged until the debtor pays. On the other hand, if the money has been collected by the assignee under an invalid assignment, it cannot be said that title to the money collected from the assignor's debtor has not passed to the assignee. Surely the debtor may pass title to his own money when he pays it to the assignee. What basis can there be for the assignor to recover the debtor's money from the assignee if the assignment is avoided after collection? Do the assignor's creditors have greater rights?

(c) Even if the assignment was void, appellant may not recover California's money.

Appellant may assert that the assignment involved herein is not merely invalid but is void; *i.e.,* the term "invalid" as used in California Civil Code § 3019 should be construed to mean "void". Although such construction is unjustified, we assume, *arguendo,* that the statute should be so construed and that the assignment (plaintiff's Exhibit 4) is void, not merely voidable. As the cases discussed or cited below show, the appellant may not recover money received by appellee under the assignment because it never was and is not now, the bankrupt's property. Appellant may recover only property of the bankrupt under § 70(e) of the Bankruptcy Act.

Where a debtor pays money under a void contract, such debtor remains the equitable owner of it and may recover it back. For example, in *Rued v. Cooper,* 109 Cal. 682, 34 Pac. 98 (1893), it was held that the assignee of an insolvent who had paid money under a contract for the sale of shares of capital stock on margin (for which reason the contract was void) could recover the money. The court states, at page 692:

> "There is no distinction between money paid under a contract declared void by the constitution and that paid under any other void contract. In all such cases the party who has paid the money remains the equitable owner of it, though he could not, in many cases, maintain an action for its recovery."

The debtor who pays under a void contract is the absolute owner of the money before payment and continues to be the equitable owner after payment. The person receiving the payment becomes the legal owner subject to the equity. Thus, where a debtor pays under a void assignment, the assignee becomes the legal owner and the debtor remains the equitable owner. Neither the assignor nor his creditors have any claim to the money. The debtor remains indebted to the assignor. The following cases, in effect, so hold:

In *Barteck v. Personal Finance Co. of Toledo,* 20 N.E. 2d 259, 60 Ohio App. 197 (1938), it was held that payment under a void assignment was no defense to a suit by the employee. The court stated, at page 260, that wage assignments when legally executed bar

an action by the employee to recover from the employer the wages withheld under the assignment, "but a false wage assignment would be in the same class as a forged one—it would be of no validity whatever and would not bar an action by the employee against an employer for wages due and withheld under such false assignment. They could be recovered, with interest." Likewise, it was held in *Atlanta Finance Co. v. Southern Railway Co.,* 84 S.E. 147, 15 Ga. App. 663 (1915), that payment of a debt for wages under a purported assignment will not discharge the debtor from liability to the alleged assignor if the payment is made with full knowledge of the fact that the assignment is void. Therefore, if the assignment here involved is void, appellant's claim is not against this appellee but rather is against the bankrupt's debtor—the State of California.

Metropolitan Life Insurance Co. v. S. F. Bank, 58 Cal. App. 2d 528, 136 P. 2d 853 (1943), seems in point on these propositions. In that case, Metropolitan, a depositor in the Bank of California, brought an action against Bank of California and San Francisco Bank. The amended complaint contained 31 counts. The demurrer of Bank of California was sustained as to the first 15 counts without leave to amend, on the ground that the statute of limitations had run as to those claims. It was overruled as to the remaining counts. The demurrer of San Francisco Bank was sustained as to all counts without leave to amend. The appeal was taken solely from the judgment of dismissal in favor of the San Francisco Bank.

Metropolitan had been induced through the fraud of its employee, Miguel, to draw and issue a series of checks to fictitious persons, which fact was not known to Metropolitan. Miguel secured possession of the checks and endorsed and presented them to San Francisco Bank, which paid Miguel. San Francisco Bank stamped its endorsement on each of the checks, and presented them to Bank of California for collection. The court observed, at page 534, that the checks were not payable to anyone, and that they were *not negotiable instruments.*

It was held that Metropolitan had no cause of action against San Francisco Bank based on the latter's endorsement, since the endorsement ran to the drawee and subsequent holders. It was held that Metropolitan had no cause of action against San Francisco Bank either for converting the checks to its own use or for converting Metropolitan's money to its own use. The court states, at page 534:

> "As to the suggested conversion of 'plaintiff's money,' the allegations of the amended complaint showed that the relationship between The Bank of California and plaintiff was the ordinary relationship of a bank to its depositor. Said relationship was that of debtor and creditor and the title to the money deposited by plaintiff in The Bank of California passed immediately to said bank. (*Arnold v. San Ramon Valley Bank,* 184 Cal. 632 [194 P. 1012, 13 A.L.R. 320]; *Glassell Dev. Co. v. Citizens' National Bank,* 191 Cal. 375 [216 P. 1012, 28 A.L.R. 1427]; *Union Tool Co. v. Farmers etc. Nat. Bank,* 192 Cal. 40 [218 P. 424, 28

A.L.R. 1417].) Plaintiff, after depositing its money with The Bank of California, was no longer the owner or entitled to the possession of any specific money which was the subject of conversion and when The Bank of California paid the amount appearing on the face of the checks to The San Francisco Bank, it paid out of its own money and not that of plaintiff. (9 C.J.S. 735) The suggested theory that The San Francisco Bank converted 'plaintiff's money' violates 'the elemental principle that a depositor has no claim to any specific assets in his bank * * *' (36 Har. L. Rev. 879)."

The last cited case deals with a drawer-creditor, a drawee-debtor and an assignee-collecting bank. The situation of San Francisco Bank is that of an assignee collecting a debt under a void assignment. The assignee-collecting bank collected certain sums of money from the drawee-debtor, upon a void non-negotiable instrument. The court clearly held that the drawer-creditor had no cause of action against the assignee-collecting bank on any theory, even though (1) his cause of action against the drawee-debtor had become barred by the statute of limitations, and (2) the drawee-debtor had a cause of action, or might have had a cause of action, against the assignee-collecting bank.

Applying these principles to the case at bar and assuming that the State of California paid the money in question to appellee under a void assignment, it seems that appellant has misdirected his suit. The right of the trustee under § 70(e) of the Bankruptcy

Act is to collect *the bankrupt's property,* and the right of the creditors is to have the *property of the bankrupt* applied to their claims. Yet appellant seeks to obtain reversal of a judgment which denies recovery of money paid by the State of California to appellee. That money belonged to the State of California prior to payment and the bankrupt at no time had any claim to it. Even if the assignment is void, as was the check in the *Metropolitan* case, it seems that at most the State of California made a mistake in paying its money, not that of a bankrupt, to appellee. While it may or may not be that the State of California could recover these payments from appellee, and while it may be that the State of California remains liable to the bankrupt for having paid under a void assignment, it seems clear that neither the bankrupt, nor his creditors, nor the appellant who stands in their shoes, has any cause of action against appellee.

For the above reasons, we respectfully submit that this court should affirm the judgment of the District Court.

Dated, San Francisco, California,
March 7, 1957.

Respectfully submitted,
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